IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 8677

W. J. DILLNER TRANSFER COMPANY,
Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND U.S.A.C. TRANSPORT, INC., *Defendants-Appellees.*

MOTION TO AFFIRM

Appellee, Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, moves that the decree of the District Court be affirmed.

This is a direct appeal from the final decree entered December 4, 1951, by a three-judge court constituted pursuant to 28 U.S.C., 2284, 2325, dismissing a complaint filed by plaintiff-appellant (herein called Dillner) to set aside an order of the Interstate Commerce Commission.[1] Appeal was

[1] The Court, consisting of Circuit Judge Austin L. Staley, and District Judges Owen M. Burns and William Alvah Stewart, also rendered its opinion on December 4, 1951, 101 F. Supp. 506.

allowed March 5, 1952. Certain appeal papers (order allowing appeal, citation on appeal, petition for appeal and assignment of errors) were received March 10, 1952. "Notice of Appeal" was received March 7, 1952. Clearly the appeal was not taken within the 60-day period allowed by 28 U.S.C., sec. 2101(b) for an appeal in a case of this kind if the 60-day period is to be computed from the date of the final decree. It is also clear the appeal was timely taken if the 60-day period is computed from the date of the Court's order of January 9, 1952, denying Dillner's petition for rehearing. Dillner's Statement of Jurisdiction under Rule 12 was not received until April 9, 1952.

The order, entered May 18, 1949, in No. MC-108068, Sub No. 12, *U.S.A.C. Transport, Inc., Extension—Western States*, 49 M.C.C. 1059 (memo.), grants a certificate of public convenience and necessity to appellee, U.S.A.C. Transport, Inc. (hereinafter called A.C. Transport) authorizing transportation of aircraft and aircraft parts between points east of the Mississippi River and between such points and points west of the Mississippi River, over irregular routes. The certificate was granted under section 207(a), part II, Interstate Commerce Act (49 U.S.C., sec. 307(a)), upon a factual showing of public convenience and necessity.

A.C. Transport entered the transportation field in 1941 to perform a highly specialized service in

the transportation of fallen airplanes. In that year it applied for and was granted, after full hearing and regular procedure, a certificate authorizing transportation as a common carrier by motor vehicle of grounded and disabled airplanes, and uncrated airplane parts, over irregular routes between points east of the Mississippi River.

On May 27, 1948, A.C. Transport sought enlargement of its operating authority so as to embrace aircraft and aircraft parts between all points and places in the United States. Common carriers by railroad seasonably protested the application and it was set for hearing. Hearings were held at Washington, D.C., Fort Worth, Texas, and Los Angeles, Calif., on September 16, October 6 and 11, 1948, before duly appointed examiners of the Commission. At said hearings witnesses for applicant A.C. Transport and for various protesting rail and motor carriers who were, or who might be if the application were granted, competitors of the applicant (but not including Dillner) testified, and 298 pages of testimony, together with 62 documentary exhibits, were received in evidence.[2]

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[2] No part of this evidence was introduced by Dillner in the Court below. Indeed, as noted in the opinion below, p. 2, "Although plaintiff was given opportunity to do so, and although defendants offered a number of exhibits in support of their opposition to the prayers of plaintiff, plaintiff elected to offer no testimony in support of its case." Among the exhibits introduced by defendants was a certified copy of the testimony given at the Commission hearings.

On April 11, 1949, an examiner's recommended report and order was issued and served upon the parties. The examiner did not recommend the grant of all the authority sought. Upon consideration of all the evidence of record, the examiner found "that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of (1) aircraft, fully assembled or partially dismantled, and component parts of any partially dismantled unit of aircraft moving in connection therewith, (2) aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character and (3) special facilities and empty containers used by applicant in the transportation of the above-described aircraft and aircraft parts, "between points east of the Mississippi River and between such points, on the one hand, and on the other, points west of the Mississippi River.

With the recommended report and order a notice was issued that exceptions thereto might be filed within 25 days and that at the expiration of said period the recommended order would become the order of the Commission and would become effective unless exceptions were filed seasonably or the order was stayed or postponed by the Commission. A copy of said report and order is appended to the Commission's answer as Exhibit B.

No exceptions were filed by or on behalf of any party, and the recommended order, by virtue of the above-mentioned notice and by operation of section 17 (5) and (10) of the Interstate Commerce Act (49 U.S.C., sec. 17 (5) and (10)), became the order of the Commission and became effective as of May 18, 1949.[3]

Approximately five months after the last-mentioned date, Dillner, for the first time, sought to intervene in the proceeding before the Commission. This was not individual action; Dillner acted through an association, the Heavy Hauling, Machinery Moving and Erecting Section of the Local Cartage National Conference (a member of the American Trucking Associations). On October 19, 1949, that association filed a petition with the Commission on behalf of its members, including Dillner, "for reopening, rehearing, and to vacate order granting certificate," alleging that none of the heavy haulers had been served with copies of A.C. Transport's application or with notices indicating that its application had been filed. Petitioner sought "to intervene and be made a party to this proceeding" and asked that the proceeding "be reopened for further consider-

[3] Although no exceptions to the examiner's recommended report and order were filed, the Commission, nevertheless, on May 5, 1949, stayed the operation thereof until May 18, 1949. No exceptions having been filed within the extended period, the said order became effective as the order of the Commission on May 18, 1949.

ation, and that the order granting the extension of authority . . . be vacated and set aside, and that a full hearing be held in order that evidence in opposition to the application may be presented. . ." (Exhibit C to the Commission's answer.)

Regulations promulgated by the Commission pursuant to statutory authority[4] require *inter alia* with respect to applications for authority to extend operations, such as the aforesaid application filed by A.C. Transport, that a copy of the application shall be delivered to the board, commission or official having authority to regulate the business of transportation by motor vehicles of each State in or through which applicant operates or proposes to operate; and that a notice of the filing of such an application upon a prescribed form (BMC-15, copy attached to Commission's answer as Exhibit B) must be delivered "to each motor carrier and to each carrier by rail or water, known to the applicant, with whose service the operations described in such application are or will be directly competitive."

In the application filed by A. C. Transport there appears the following certificate of service:

> "A copy of this application was delivered, in person or by registered or receipted mail, to each of the following State boards or officials:

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[4] The regulations appear in the Commission's order of December 7, 1940, a copy of which is attached to Dillner's complaint as Exhibit No. 1.

All of the 48 States and the District of Columbia. * * *

There are no known competitors either certificated or equipped to specialize in the proposed operation; however, copies of this application have been served on the Common Carrier Conference of the American Trucking Associations, Inc., 1424 16th Street, N. W., Washington, D. C."

A reply (dated October 29, 1949) to the aforesaid petition of the Local Cartage National Conference, etc., was filed October 25, 1949, by A.C. Transport, a copy of which is attached to the Commission's answer marked Exhibit D. In said reply A. C. Transport averred:

"1. The only ground stated by the petitioner in support of its Petition is alleged lack of notice of the filing of the Application and proceedings in connection therewith. The Applicant did not have, and does not now have any knowledge that any of the carriers included in petitioner's list of membership are or ever were engaged in the transportation of commodities covered by the application.

Out of an abundance of caution, this Applicant served a copy of its application on the American Trucking Associations, and that organization participated in the hearings.

In the several hearings, numerous witnesses appeared and testified with respect to their experience and ability in the field covered by the application. Some of the testimony recited in great detail the heavy hauling activities of the protestants, the equipment owned, etc. etc. The trade papers repeatedly carried notices of hearings and news items in connection with the application and, under these circumstances, it is idle for this group to come in at this late date and plead lack of notice.

2. On the face of the petition, the group is shown as being a local cartage group—heavy hauling division; however the application is for over-the-road operations to, from, and between all points in the United States, which is about as far removed from any concept of local cartage that might be imagined; and this Applicant was under no obligation to notify any local cartage operator of its application for over-the-road operations.

3. The petitioner has failed to show the Commission that any of its alleged members have any interest in the proceedings whatever. They list 58 names as members of the group; however, we challenge the inference that those listed were either present or otherwise authorized the filing of the instant peti-

tion. Twenty-nine of the names listed are shown to have addresses in States east of the Mississippi River, wherein this Applicant already holds authority from the Commission to transport articles usually handled by heavy haulers. Eighteen of the alleged members are shown with addresses west of the Mississippi River, and the Commission did not grant applicant any authority between any points west of the Mississippi, but did grant the applicant authority between points west of the Mississippi and points east of the Mississippi River.

There are left 11 names of carriers located in Maine, Florida, Kentucky, Tennessee and Michigan; however, there is not a syllable of information with respect to their operating authority, nor is it even shown whether they are common or contract carriers.

Under Paragraph 5 of the petition it is stated that at least 30 of the alleged members are competing with the applicant. However, the 30 are not identified, but 58 are listed in the membership list. It is, therefore, obvious on the face of the petition that it represents nothing more than a belated awakening of a sleeping group.

This application has been pending before the Commission for a long time, and the petitioners here have shown the Commission

nothing to support their petition. The case was heard from coast to coast, and the applicant and the public are entitled to some consideration.

The petition should be denied."

Upon consideration of said petition and of the answer thereto, the Commission denied the petition by order dated December 5, 1949 (Exhibit 2 to complaint). The Commission did not deny that petition on the ground that it came too late. It may reasonably be assumed that the Commission, without acting arbitrarily, could have denied the petition on the ground that petitioners had failed to show that they were or would be direct competitors of A.C. Transport, that therefore their nonreceipt of individual notices constituted no excuse for their failure to act promptly. Instead the Commission considered said petition on its merits and denied it "for the reasons (1) that no useful purpose would be served by permitting the intervention at this time; (2) the evidence adequately supports the findings; and (3) petitioner has not established that any additional evidence it could submit would alter the conclusions already reached."

A certificate of public convenience and necessity covering the operating rights of A.C. Transport as enlarged by the report and order here involved (including also those originally granted) was

issued by the Commission on January 18, 1950 (Exhibit 3 to Dillner's complaint.)[5]

PROCEEDINGS IN COURT BELOW

Approximately three months thereafter this suit was brought by Dillner as the sole plaintiff (and no one intervened in its behalf) alleging (1) that the Commission's order was invalid on the ground that applicant did not give due notice to Dillner of the filing of said application and (2) that the hearings upon said application were not conducted by hearing examiners appointed under the Administrative Procedure Act, 5 U.S.C., secs. 1001-1011.

In its answer to the complaint the Commission admitted that applicant A.C. Transport did not give specific notice to Dillner of the filing of its

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[5] Individual notices to direct competitors are not the only publicity required by the Commission to be given to applications by motor carriers for operating authority. As alleged in the Commission's answer (par. VI, pp. 10-11) A. C. Transport's aforesaid application of May 27, 1948, in accordance with the Commission's custom, was, immediately after its filing, made available for public inspection for a period of three days. And, as further detailed in said answer, notices of the three hearings upon said application were sent by United States mail to the Governors and State Commissions of all the States of the United States and the District of Columbia, to numerous individual railroads, railway associations, motor transport associations, and individual motor carriers and many others. Through these channels, as well as publicity in the trade journals, all of the protesting carriers who appeared at the Commission hearings, obtained knowledge of the proceedings.

aforesaid application. The Commission, however, expressly denied "that either section 205(e) or section 206(b) of the Interstate Commerce Act, part II, or the regulations of the Commission thereunder, required such notice." (Answer, I.C.C., par. VI, pp. 9-10). Section 205(e) provides that, in accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under part II, to interested parties.[6]

Section 206(b) provides, so far as here pertinent, that—

> "Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require."

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[6] The paragraph in full reads as follows:

> "In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission, or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties."

Dillner has not challenged the reasonableness, sufficiency or validity of these regulations, nor has it submitted any proof whatsoever that it was in any wise or in any degree competitive with A. C. Transport either in the operations conducted at the time the latter filed its application with the Commission or in the proposed extended operations for which it sought authority in said application. The Commission having specifically denied in its answer to Dillner's complaint that either section 205(c) or section 206(b) of the Act or the regulations of the Commission thereunder required applicant to give specific notice of the filing of its application to Dillner, an issue of fact was raised but Dillner did not respond to this issue, for it submitted no proof whatever, and absolutely no evidence of any kind to prove that it was a direct competitor of applicant (and if it had been, of course applicant would have known that it was) and that it was entitled to notice or that even if it was entitled to notice no actual knowledge of the filing of the application had come to it.

After submission of briefs and full oral argument, the specially constituted three-judge Court, on December 4, 1951, gave careful consideration to plaintiff's contention respecting notice, and found it to be without merit. The Court found and held that—

> "Plaintiff has neither alleged nor attempted to prove facts bringing him within the provisions of the Commission's general order with respect to notice. . . "

Respecting the status of the Commission's examiners which presided at the hearings, the Court finds and holds that "This issue was raised for the first time in this court." In asking the Commission to grant rehearing, plaintiff made no suggestion that the application should be reheard because the Commission examiners who presided were not Administrative Procedure Act hearing examiners. Indeed, at no stage of the proceeding before the Commission did plaintiff interpose any objection to the grant of the extended authority to the applicant on this ground.

IMPORTANCE OF THE QUESTIONS PRESENTED

The first of the two questions presented is obviously unimportant. It is merely a question of fact as to whether Dillner is a competitor of A.C. Transport. If Dillner is not such a competitor, it clearly has no standing to maintain a suit in court to set aside the certificate issued to A.C. Transport. For, unless it is a competitor, the grant of the certificate to A.C. Transport could not cause Dillner any injury; in other words, the Commission's order granting the certificate could not cause Dillner any injury, either actual or threatened. As the three-judge Court below found,

> "Although plaintiff was given opportunity to do so, and although defendants offered a number of exhibits in support of their opposition to the prayers of the plaintiff, plaintiff elected to offer no testimony in support of its case."

The second question is however, we think, an important one. In the Statement as to Jurisdiction submitted to this Court by the United States and the Interstate Commerce Commission in *L. A. Tucker Truck Lines, Inc.* v. *U.S. and I.C.C.*, 100 F. Supp. 432, it was urged that the Government's appeal therein "presented the substantial question whether the objection that the examiner who presided at an agency hearing had not been appointed under section 11 of the Administrative Procedure Act may be raised for the first time upon judicial review of the administrative proceedings." There Trucker, admittedly a competitor of the applicant to the Commission, Pemiscot Motor Freight Company, promptly entered its appearance in the proceedings before the Commission and opposed the application. After the application had been granted, Tucker filed suit to enjoin the order. Up to this point Tucker had made no objection based upon the fact that the examiner had not been appointed pursuant to the Administrative Purcedure Act.

When the District Court convened to hear the *Tucker* case on May 24, 1951, Tucker requested,

and obtained, leave to file an amended petition raising the issue that a duly authorized examiner had not presided at the hearings. The Court held with respect to this issue that since the proceedings "had not been heard by a properly qualified person under section 11 of the Administrative Procedure Act," the Commission "did not have jurisdiction" and the proceedings before it were "invalid." The Court accordingly "revoked and canceled" Pemiscot's certificate, set aside the Commission order granting it, and remanded the matter to the Commission for further proceedings not inconsistent with the Court's opinion. The present case is different from the *Tucker* case in that concededly Tucker, being a competitor of the applicant for a certificate and having promptly intervened in the Commission proceeding, had standing to maintain the suit to set aside the order, whereas Dillner was not a party to the Commission proceedings and failed to show in court, although he had the opportunity to do so, that he was a competitor of the applicant. Having failed to show that the Commission's order would subject him to injury, actual or threatened, therefore, Dillner had no standing to maintain the suit to set aside the Commission's order on any ground.

Thus the question whether Dillner had the right to raise the Administrative Procedure Act question for the first time in court is not necesarily reached in the present case. In any event, we think that the ruling of the three-judge court in the present case, that "clear judicial expression

supports the doctrine that failure to raise objections so as to permit consideration thereof by the Commission, bars review of such objections when raised for the first time in a judicial proceeding of this type," was correct and that the contrary ruling in the *Tucker* case was erroneous, as upsetting without good reason a well-established salutary rule of judicial review of administrative orders.

If the Court finds, however, that the second question here involved is reached, then we think it could be decided without oral argument upon the decision in the *Tucker* case, in which the Court has found probable jurisdiction.

CONCLUSION

For the above reasons we respectfully submit that the decree below was so clearly right it should be affirmed without oral argument.

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Chief Counsel.

J. STANLEY PAYNE
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INTERSTATE COMMERCE COMMISSION.

APRIL 1952.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 77

W. J. DILLNER TRANSFER COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND U. S. A. C. TRANSPORT, INC.

MEMORANDUM IN OPPOSITION TO MOTION TO AFFIRM PURSUANT TO RULES 7 AND 12 OF THE SUPREME COURT

The statement of facts recited in appellee's (Interstate Commerce Commission) motion to affirm are substantially correct but the conclusions of law are erroneous.

Plaintiff Dillner had no legal notice of the proceeding in question and consequently no opportunity to be heard. The petition to re-open the case to submit proof to defendant Commission was filed in good time but was arbitrarily denied.

The hearings held by the several "unqualified" Examiners were "void" not merely "voidable." Defendant Commission could have heard Dillner's evidence and disposed of the matter promptly but it would not listen, even

though there were serious questions involving the public interest.

The motion to affirm should be denied and the judgment of the Court below should be reversed and the case remanded with instructions; however counsel concurs in the request that the case be disposed of without argument, as the decision of the *Tucker* case will no doubt be controlling.

ERNIE ADAMSON,
Counsel for Appellant.

(1979)